Ngotho Architects v PS, Min of Education Science and Technology & another (Civil Suit 238 of 2012) [2025] KEHC 839 (KLR) (Commercial and Tax) (3 February 2025) (Ruling)

Neutral citation: [2025] KEHC 839 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT 238 OF 2012

A MABEYA, J

FEBRUARY 3, 2025

BETWEEN

NGOTHO ARCHITECTS .... PLAINTIFF

AND

PS, MIN OF EDUCATION SCIENCE AND TECHNOLOGY ..... 1ST DEFENDANT

THE HON ATTORNEY GENERAL .... 2ND DEFENDANT

RULING

1. Before Court is the application dated 16/11/2023. The same is brought under sections 1A, 1B, 3A, 63€ and 80 of the *Civil Procedure Act*, CAP 21 Laws of Kenya, orders 45 rule 1 and 51 rule 1 of the Civil Procedure rules 2010. The application seeks review of the ruling of Majanja J delivered on 13/10/2023 which directed the applicant to pay the plaintiff Kshs 20,576,594.70.

2. The application was supported by the grounds set out on the face of it and the supporting affidavit sworn by Dr. Belio Kipsang. It was the applicant's contention that the impugned ruling was premised on an erroneous finding that the respondent was entitled to interest accrued from 15/6/2022.

3. It was contended that the dispute arose from an arbitral award published on 10/4/2013 by which the arbitrator allowed the respondent's claim for Kshs 17,444,982.12 plus interest at 12% p.a. That the applicant had paid a sum of Kshs 37,202,057.02 towards settlement of the decretal amount. It was stated that the issue concerning interest was disputed by the parties and the court directed the parties to canvass the same by way of affidavit evidence.

4. That on 15/6/2022, the Court stated that he respondent was entitled to the interest in the sum of Kshs 20,576,594.70. That the said ruling had occasioned the applicant great injustice as it was not based on a decree or certificate of order against the government.

5. The respondent opposed the application vide grounds of opposition dated 18/4/2024. It was contended that the applicant had failed to satisfy the conditions set out for review under Order 45 of the Civil Procedure Rules. It was averred that the application as filed by the applicant was an appeal against the decision of the Court.

6. The application was canvassed by way of written submissions which I have considered.

7. Having considered the record, I find that the main issue for determination is whether the applicant has met the threshold for review. The grounds for a review of judgment or ruling are laid out under Order 45 Rule 1 as follows: -

> " 1(1) Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
>
> (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review"

8. The present application is based on the ground that there was an error apparent on the face of record. In considering what constitutes an error apparent on the face of record in the case Muyodi vs. Industrial and Commercial Development Corporation & Another (2006) 1 EA 243, the Court of Appeal stated as follows: -

> " In Nyamogo & Nyamogo vs Kogo (2001) EA 174, this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal."

9. Further, in National Bank of Kenya Limited v Ndungu Njau (1997) eKLR, the Court of Appeal stated as follows: -

> " A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established."

10. In the present case, the applicant's contention is that the Court delivered the impugned ruling on 13/10/2023 where it held that the respondent was entitled to the claim of Kshs 20,576,594.70 in interest. It was the applicant's position that the court's opinion that the respondent was entitled to the decretal sum on account of interest and that the applicants did not dispute the respondent's computation was wrong. That as a result of this ruling the applicant suffered great prejudice. The respondent on its part stated that the application did not meet the threshold for review.

11. I have considered the application and the contestations before Court. An error apparent on the face of the record in line with the afore-stated cases is an error that is clear and obvious and can be ascertained without the need for additional information. On 13/10/2023, the Court exercised its discretion and held that the respondent was entitled to interest amounting to Kshs 20,576,594.70.

12. The issue before the Court was in respect of the interest payable and the parties were directed to file submissions on that matter. In the ruling, the Court held that the two consents filed by the parties did not show that they had agreed to freeze the accrual of interest. The Court further observed that since the respondent's computation was not denied by the applicants, the same remained to be due and payable.

13. From the foregoing, I find that the application before Court challenges the impugned ruling on merit. In ascertaining whether there was an error in awarding interest, the Court would be sitting on appeal of the impugned decision. The best recourse for the applicant was to file an appeal and not review. It is not within this Court's mandate at this stage to reexamine or reassess its findings on the merits. To do so would exceed the permissible scope of a review application. Error apparent on the face of the record does not require re-assessing the merits of an impugned decision. It must be clear and on the face of it requiring no arguments.

14. In view of the foregoing, I find the application to be without merit and hereby dismiss the same with costs.

    It is so ordered.

SIGNED AT NAIROBI THIS 29TH DAY OF JANUARY, 2025.

A. MABEYA, FCI Arb

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2025.

F. GIKONYO

JUDGE